

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	MB Docket No. 16-41
Promoting the Availability of Diverse and)	
Independent Sources of Video Programming)	

Comments of Cinémoi

Cinémoi respectfully submits its comments in response to the Commission’s Notice of Proposed Rule Making (“NPRM”) on Promoting the Availability of Diverse and Independent Sources of Video Programming.¹

Originally launched on DIRECTV on September 17, 2012, Cinémoi is a woman-owned, 24-hour, award-winning television network dedicated to curated films, high couture, international lifestyle and green programming. It is defined by high-quality content that reintroduces American audiences to outstanding vintage and contemporary films and transports them to the most glamorous events and exotic destinations around the world. Cinémoi is available on Verizon FiOS, Frontier and over the top via the internet and reaches millions of viewers. Cinémoi is also a minority-owned channel, as it is one of only two networks owned by a woman and it is in that vein that Cinémoi is trying to make a difference in the media industry and designed to lift the image of women.

I. Definition of Independent Programmer

Cinémoi is an independent programmer in every sense of the word. It is not affiliated

¹ 81 FR 73368 (Oct. 25, 2016) (“NPRM”)

with a broadcast station that enjoys retransmission consent, it does not control sports rights, and it is not part of a bundle of fully distributed channels that would increase its leverage against MVPDs. The FCC seeks comment on whether the definition of independent programmer should be more narrowly defined than the definition utilized in the NOI.² As a threshold matter, the FCC must clearly define what it means to be vertically integrated with an MVPD. For purposes of this NPRM and the preceding NOI, commenters seem to have assumed that the FCC will utilize the definition of a cognizable interest codified in 47 CFR 76.1000 (b), but the Commission has not affirmed that assumption.

Even assuming a five percent attributable interest definition, defining an independent programmer as one not associated with an MVPD is still far too broad. Cinémoi believes that a proper definition of independent programmer should exclude any programmer affiliated with an MVPD, broadcast television licensee, or a programming conglomerate that controls more than three television programming networks. Such a definition would ensure that FCC rules designed to protect diverse and independent sources of video programming are narrowly tailored to the appropriate purveyors of that content.

To the extent that the FCC is inclined to further define independent programmers based on their ownership or appeal to minority and underserved populations, Cinémoi encourages the Commission to recognize women in this definition. Women comprise a majority of the population and account for 85 percent of all consumer purchases³. Women deserve to be far better represented in ownership of media companies. It is not enough simply to have woman-centric programming. When a woman runs a network, she influences every aspect of that organization.

² 31 FCC Rcd at 1610, n.4.

³ Women Make Up 85% of All Consumer Purchases, Bloomberg L.P., Women Make Up 85% of All Consumer Purchases. (n.d.). Retrieved January 26, 2017, from <https://www.bloomberg.com/news/videos/b/9e28517f-8de1-4e59-bcda-ce536aa50bd6> (last visited Jan 26, 2017).

This omnipresent influence is necessary to create a culture which is best able to produce programming that truly caters to and reflects women's interests, tastes, culture and sensibility

II. Program Bundling

Before commenting on the appropriateness of the MFN and ADM restrictions contemplated in the NPRM, Cinémoi believes it is important to draw attention to the reason these onerous provisions exist. MFN and ADM restrictions are an industry response to a glut of regurgitated and homogenized content forced upon MVPDs by large broadcast networks and programming conglomerates. In order to obtain "must have" programming, MVPDs are forced to purchase bundles of less desirable content that neither the MVPD nor its subscribers want. As AT&T notes in its comments, "programming acquisition agreements generally do not contain any objective performance criteria... MFN and ADM provisions are among the very few tools available to MVPDs to offset this leverage, provide some limited balance in the negotiation process, and thus protect their huge investment in video content."⁴ Cinémoi understands that MVPDs and programming conglomerates - led by broadcasters with retransmission consent rights and owners of sports rights - are in an arms race for marketplace leverage. In order to seize an ever increasing share of programming dollars, conglomerates create new channels of regurgitated and repackaged content and bundle these networks to demand additional license fees. In response, most favored nation clauses and alternate distribution method clauses have become increasingly aggressive.

In addition to being the impetus for MFN and ADM restrictions, bundling further harms independent programmers by challenging the price elasticity of pay-TV. Bundling has created

⁴ AT&T NOI Comments at 11

significant price pressure on MVPDs. With a limited ability to raise prices but significant increases in input costs forced upon them, MVPDs are forced to cut costs. Diverse and independent voices are the first victim of these cost cutting measures. Without significant leverage, independent programmers are denied carriage, offered below market rates and terms, dropped in channel lineups or forced to pay for carriage in a perverse subsidization of bundled programming.

By solely focusing on certain types of MFN and ADM provisions in this NPRM, the Commission is effectively treating the symptoms, but not the disease. Certainly independent networks are harmed by unconditional MFNs and unreasonable ADMs, but those contractual provisions may not exist or be as severe if program bundling did not offset the delicate balance between buyer and seller. To truly address the obstacles independent programmers face and to promote the availability of diverse and independent sources of video programming, the FCC should revise this NPRM and address bundling. Short of that, the FCC must define “independent programmer” in such a manner that the relief provided by this NPRM only applies to actual purveyors of diverse and independent sources of video programming, not broadcast television licensees and media conglomerates that are ultimately responsible for the development of MFNs and ADMs.

III. Unconditional Most Favored Nation Clauses

Cinémoi supports the Commission’s determination that no public interest benefits accrue from unconditional MFNs. However, if the Commission narrowly defines an independent programmer as Cinémoi has suggested in these comments, it is difficult to justify public interest benefits from any form of MFN. Commission notes that “MFN provisions ensure that MVPDs

are able to respond to changes in consumer demand and remain competitive, facilitate longer term carriage arrangements that prevent consumers from experiencing programming disruptions, promote candor between the negotiating parties and facilitate improved contracts.”⁵ However, MFNs offer zero consumer benefit when forced upon truly independent programmers.

Independent programmers rarely receive significant license fees for their content so it cannot be argued that MFNs forced on independent programmers retard the growth of cable prices or otherwise keep MVPDs from being nimble and competitive. Likewise, the disparity in leverage between independent programmers and MVPDs produces de facto “take or leave it” carriage proposals that leave little room for negotiation – certainly not the type of negotiations that would demand more candor or result in longer carriage terms.

Finally, MFN clauses prevent independent programmers from creating unique carriage proposals and fee arrangements with MVPDs and OVDs that are early adopters of new content and independent networks. Independent networks are in many senses, small businesses that need flexibility to develop innovative marketing strategies in order to gain carriage. MFN clauses that reward late adopters with the same benefits as early adopting MVPDs eliminate any incentive independent channels can offer to get launched.

IV. Unreasonable Alternate Distribution Methods Clauses

Over the top distribution of programming is quickly becoming the only viable means for independent programmers to demonstrate their content. Cinémoi appreciates the FCC recognizing that certain restrictive ADM provisions have no discernibly procompetitive justifications. Over the top programming is one of the few remaining ways for independent

⁵ NPRM, n.87.

programmers to showcase their appeal to consumers and marketplace viability. The ability to produce quality programming and showcase actual viewer metrics is a critical factor prior to attracting investment. However, relying solely on OTT distribution is a one-way ticket to bankruptcy. Linear distribution remains the primary source of new content discovery by viewers and remains the most effective way to develop awareness, brand recognition and popularity. To that end, ADMs prevent independent programmers from leveraging OTT, the one universal distribution platform available to them, while they work to secure carriage on linear platforms required for survival.

In the NPRM, the FCC has identified four *prima facie* types of unreasonable ADMs, but stops short of drawing a bright line restriction on these provisions⁶. Cinémoi is concerned that a case by case investigation of unreasonable ADM clauses will offer no protection to independent programmers. Because ADMs can restrict access to the one source of revenue and discovery for an emerging independent network, ADMs also have the ability to choke off the resources required to adjudicate the reasonableness of those ADMs at the FCC. For example, an MVPD may demand an ADM that prevents an independent programmer from offering its content on its own website to paying subscribers as a condition of carriage. This would appear to be an unreasonable ADM under the NPRM. However, the nature of the ADM also deprives the independent programmer of subscriber revenue that is necessary to bring a complaint to the Commission. For this reason, the Commission should codify a bright line restriction of the types

⁶ NPRM ¶ 24 “certain ADM provisions appear unlikely to yield any procompetitive benefits that would outweigh the attendant public interest harms. Such ADM provisions include those that: (i) bar an independent programmer from licensing content, for an extended time period or indefinitely, to an OVD that distributes content for free to consumers; (ii) bar an independent programmer from licensing content, for any period of time, to an OVD that distributes content to paying subscribers; (iii) bar an independent programmer from licensing content to an OVD unless or until the OVD meets conditions that are difficult to satisfy in a timely manner or are designed to undermine the OVD’s ability to compete; or (iv) provide for any pecuniary or non-pecuniary penalty or adverse impact on an independent programmer for the provision of its video programming to an OVD.”

of ADMs the NPRM finds to be presumptively unreasonable.

V. Conclusion

Cinémoi appreciates the Commission's attention to the critically important issue of diversity and independent voices in media. Independent programmers are the entrepreneurial risk takers that drive innovation in the marketplace. This Notice of Proposed Rule Making takes great strides in leveling the playing field between independent programmers, MVPDs and conglomerate programmers. Accordingly, Cinémoi encourages the Commission to finalize this rulemaking in 2017.

Respectfully submitted,

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